

STATE OF MICHIGAN
COURT OF APPEALS

BAY CITY POLICE AND FIRE RETIREES,
JERRY BARBRET, WILLIAM POWELL, GARY
FOX, JERRY ZIELINSKI, PAUL A.
ROZNOWSKI, OWEN GWIZDALA, RICHARD
FIERENS, GEORGE CARDINAL, EMMONS
MILLER, LARRY MCDERMOTT, DENNIS
SHARP, JAMES FOGELSONGER, LEON
LESZCZYNSKI, and RICHARD GONYEA,

Plaintiffs-Appellees,

v

BAY CITY POLICE AND FIRE RETIREMENT
SYSTEM BOARD OF TRUSTEES, KIM MEAD,
DAN DEWAELE, RON MARANDE, and TOM
HEREK,

Defendants-Appellants,

and

ASSET STRATEGIES PORTFOLIO, INC., and
GEORGE H. VITTA,

Defendants.

UNPUBLISHED

August 24, 2006

No. 267018

Bay Circuit Court

LC No. 05-003132-CZ

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendants-appellants appeal as of right from the trial court's orders denying their motions for summary disposition predicated on governmental immunity and for reconsideration. We reverse and remand. This appeal is being decided without oral argument under MCR 7.214(E).

This case arises from defendant Board of Trustee's decision to invest approximately twenty percent of the Retirement System's assets in a single entity. The Public Employee

Retirement System Investment Act (PERSIA), MCL 38.1132 *et seq.*, limits investments by a fiduciary that is not the state treasurer to smaller percentages of a system's total assets. See MCL 38.1140a and 1140d. Accordingly, an Opinion of the Attorney General concluded that "the Bay City Police and Fire Pension Plan and Retirement System Board of Trustees's investment of 20% of the system's total assets in the Advanced Investment Management Enhanced Equity Index Commingled Fund LP was not an authorized investment under the Public Employee Retirement System Investment Act." OAG, 2003, No 7144, p 4 (November 5, 2003).

Plaintiffs commenced action, asserting a breach of fiduciary duties against defendants-appellants and seeking money damages. Defendants-appellants moved for summary disposition on the basis of governmental immunity. The court denied the motion, explaining as follows:

The cases cited in Defendant Trustees' brief provide ample support for the proposition that investment of retirement funds is a governmental function, however . . . Plaintiffs have alleged facts attacking the remaining two conditions necessary for Defendant Trustees to enjoy the protection of governmental immunity. Specifically, Plaintiffs' complaint makes allegations that would show Defendant Trustees were not acting within the scope of their authority, and could not have reasonably believed they were doing so, and also that Defendant Trustees were grossly negligent in performing their duties. These include detailed allegations as to why Defendant Trustees were not statutorily authorized to make the investment, the assertion that they made no effort to seek legal counsel as to the propriety of the investment, as well as other alleged failures to act that would show Defendant Trustees did not take reasonable measures to protect the retirement fund's beneficiaries.

In denying defendants-appellants' motion for reconsideration, the trial court explained that, although the allegation of a violation of a statute is one of ordinary negligence only, not gross negligence, plaintiffs had pleaded in avoidance of governmental immunity by asserting that the trustees had "authorized the investment of a quantity of funds that greatly exceeded the amount the Board was statutorily allowed to invest in any one investment" and could not have reasonably believed they were authorized to do so.

On appeal, defendants-appellants assert that they are entitled to governmental immunity because they reasonably believed their actions were within the scope of their governmental authority, and, alternatively, that the System's Board of Trustees is a quasi-judicial body that is entitled to quasi-judicial immunity.

This Court reviews a trial court's decision regarding a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). MCR 2.116(C)(7) authorizes motions for summary disposition premised on "immunity granted by law" A motion for summary disposition based on governmental immunity is decided by examining all the documentary evidence submitted by the parties and determining whether immunity applies. *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004).

Fire fighters' and police officers' retirement systems' boards of trustees are legislatively defined as quasi-judicial bodies, whose "actions," generally, are reviewable only by writ of certiorari. MCL 38.555.¹ Quasi-judicial immunity "is available to those serving in a quasi-judicial adjudicative capacity as well as 'those persons other than judges without whom the judicial process could not function.'" *Maiden v Rozwood*, 461 Mich 109, 134; 597 NW2d 817 (1999), quoting 14 West Group's Michigan Practice, Torts, § 9:393, p 9-131. Because the Legislature has determined that defendants-appellants constitute a quasi-judicial body, they are entitled to the benefits of quasi-judicial immunity. Accordingly, rather than suing the board and its members for damages, plaintiffs should have sought a writ of superintending control to correct the erroneous decision. See MCL 38.555, MCR 3.302(C), and *Glinski v Detroit Policemen & Firemen Retirement Sys*, 34 Mich App 161, 164; 190 NW2d 728 (1971).

In their appellate brief, plaintiffs cite the dissenting opinion in *Payne v Muskegon*, 444 Mich 679, 726, n 16; 514 NW2d 121 (1994), in support of the proposition that only defendants' judicial or quasi-judicial decisions, and not their investment decisions, should be entitled to quasi-judicial immunity. However, the language in MCL 38.555 is clear; it broadly states that, as a quasi-judicial body, a retirement board's "actions," not just its judicial or quasi-judicial decisions, "shall be reviewable by writ . . . only." If the language in a statute is clear and unambiguous, courts lack the authority to interpret a meaning beyond the scope of its text. *Koontz v Ameritech Services*, 466 Mich 304, 312; 645 NW2d 34 (2002).

Plaintiffs additionally argue that an analysis of the PERSIA indicates that the Legislature intended that the act adopt the same standard of care required of investment fiduciaries under the Employee Retirement Income Security Act (ERISA) and that, therefore, the PERSIA creates an exception to any governmental immunity otherwise granted to public employee retirement boards. However, regardless of whether the PERSIA does, in fact, apply the same standard of care required of investment fiduciaries under the ERISA, that fact does not alter the broad grant of quasi-judicial immunity to public employee retirement boards under MCL 38.555.

We conclude that the trial court should have granted defendants-appellants summary disposition, albeit on a basis not considered by the trial court.

Reversed and remanded for entry of an order granting summary disposition to defendants-appellants. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Patrick M. Meter

¹ We note that MRE 3.302(C) states that "[a] superintending control order replaces the writs of certiorari and prohibition and the writ of mandamus when directed to a lower court or tribunal."